

## **EXHIBIT 2**



# EARTHJUSTICE

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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

March 22, 2005

*Via E-Mail, Followed by U.S. Mail*

James Maysonette, Trial Attorney  
United States Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369

Re: NW Toxics Coalition v. U.S. Department of the Interior; Case No. C04-1998C

Dear James:

In November 2004, we began discussions about the scope of the administrative record in this action. In particular, we explained our expectation that the administrative record would include the full inter- and intra-agency communications, analysis, and exchanges leading up to and proceeding throughout the rulemaking, as is typically included in the record for an agency regulation challenge involving multiple agencies and extensive internal dialogue. We specifically identified for inclusion: (1) communications with industry and internal dialogue preceding the advance notice of proposed rulemaking; (2) internal communications (such as meeting notes, emails, drafts, memoranda) involving not only the Services but also the Environmental Protection Agency ("EPA"), the U.S. Department of Agriculture ("USDA"), and the Council on Environmental Quality ("CEQ"); (3) attorney involvement in drafting the regulation and related documents; (4) drafts and communications regarding the Alternative Consultation Agreement; and (5) the inter-agency scientific review of EPA's risk assessment process leading eventually to the Overview document and the Services' review of that document.

We agreed to confer as to the scope of the record in mid-January. When we conferred on January 14, 2005, you indicated that the administrative record would be limited to the records provided to the ultimate decisionmaker, the agency's stated rationale, and the official rulemaking documents, namely the Federal Register notices embodying the proposed and final rule, the substantive comments submitted, and the final versions of the Alternative Consultation Agreement, the Overview document, and the Services' sign-off on that document. You confirmed that the following records would not be included in the administrative record:

1. Any internal or inter-agency records preceding the advance notice of proposed rulemaking;
2. EPA or USDA records pertaining to the rulemaking, even though EPA co-issued the advance notice of proposed rulemaking and took administrative responsibility for the initial rulemaking process including creation and oversight of the public docket;
3. The proactive consultation that precipitated the review of EPA's risk assessment process;
4. The inter-agency review of EPA's risk assessment process, which drew upon the Services' past critiques of EPA's risk assessments for ignoring significant science and impacts, and which led to the inter-agency review of the Overview document;
5. Drafts and internal reviews and dialogue concerning EPA's risk assessment process, the Overview document, the Services' signoff on the Overview document, and the findings and statements made in the preamble to the final counterpart regulations pertaining to EPA's risk assessments, the Overview document, and the Services' signoff on that document;
6. Inter-agency meetings involving EPA, USDA, either of the Services, CEQ, or other agencies related to the proactive consultation, the review of EPA's risk assessment process, and/or the counterpart regulations and related documents;
7. Drafts, comments, and edits of various versions of the proposed and final counterpart regulations; and
8. Inter-agency and intra-agency communications, drafts, edits, and meetings pertaining to the development of the Alternative Consultation Agreement.

While you represented that the administrative record would not include any of these items, the extraordinarily lean scope of the filed administrative record is astonishing. It is without question the most sanitized administrative record our office has ever seen. It contains none of the preliminary records, scientific assessments, and internal agency give-and-take that are typical of an administrative record. We have even been unable to locate the body of substantive comments submitted in response to the advance notice of proposed rulemaking.<sup>1</sup>

By contrast, the Services recently certified an administrative record in an analogous challenge to the joint counterpart regulations issued for National Fire Plan projects. While there is some dispute over the completeness of that record, its index identifies over 500 records of internal notes, drafts, edits, comments, and emails pertaining to the development of the rule, including non-privileged input from attorneys. For example, the record includes documents

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<sup>1</sup> On a smaller note, the final rule and the Services' letter signing off on the Overview document refer to 81 attachments and 26 reference documents, while the administrative record includes only 80 attachments.

showing that the Services held meetings and communicated about drafting the regulation, the Alternative Consultation Agreement, the associated environmental assessment, and the training materials for self-consultation certification. None of these types of documents has been included here. The Services also provided a privilege log identifying 53 documents excluded from the National Fire Plan record based on attorney-client privilege. The record we have been provided excludes any privilege log, presumably because the record has been defined so narrowly that the agency believes it has no withheld no documents that would fall within its narrowly defined record.

Not only does the meager record filed in this case pale in comparison with the record in the National Fire Plan counterpart regulations challenge, but the few internal documents included in this record (apparently because they were provided to or memorialize discussions with the Fish and Wildlife Service decisionmaker) also confirm the history of extensive communications that have been omitted. For example, record documents reference: (1) CEQ meetings on the counterpart regulations; (2) discussions with EPA regarding the adequacy of their risk assessment methodology; (3) drafts and revisions of the regulation and preamble; (4) extensive chemical industry input through meetings with Services' staff and officials, critiques of agency work products, and briefing on EPA's risk assessment process (including a meeting with the Assistant Secretary for Fish and Wildlife and Parks, who signed the final rule, but for which no records have been included in the record); (5) the Services' criticisms of EPA's risk assessment process; (6) the counterpart regulations' dependence on the outcome of the inter-agency scientific review of EPA's risk assessment process; (7) input from the Services' field staff and technical specialists on the review of EPA's risk assessment process; and (8) extensive comments on EPA's risk assessments or pesticide consultations that were apparently omitted because they did not expressly address the proposed rule. Because the administrative record is not paginated, we cannot provide page citations to the pertinent documents, but they can be found on Disk 1, beginning with Document 21 and ending with Document 35.<sup>2</sup>

We disagree that the "administrative record" filed to date embodies the full administrative record for the counterpart regulations. We ask the Services to reconsider their position that the record narrowly consists of only the documents supporting the agencies' position and that they may exclude broader agency communications pertaining to the challenged actions. See Maritime Management, Inc. v. United States, 242 F.3d 1326, 1335 (11<sup>th</sup> Cir. 2001) (government's exclusion from administrative record of documents undermining its position constitutes bad faith).

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<sup>2</sup> This raises a separate issue concerning the form of the administrative record. We are concerned that the lack of bates-stamping or other pagination system will make the record cumbersome for the parties, not to mention the Court.

James Maysonette  
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Because we have until April 1, 2005 to pursue discovery and file an appropriate motion to complete the record, we request a response from you on these matters no later than March 29, 2005.

Sincerely,



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